United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7405

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-7405

PAT WRIGHT and JACK LIEBERMAN,

Plaintiffs-Appellants,

-against-

CHIEF OF TRANSIT POLICE, and CHAIRMAN and MEMBERS OF THE BOARD OF THE NEW YORK CITY TRANSIT AUTHORITY,

Defendants-Appellees.

PLAINTIFFS-APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

This is an appeal pursuant to 28 U.S.C. § 1291 from a final judgment of the United States District Court for the Eastern District of New York, Hon. Walter Bruchhausen presiding, dismissing the complaint after trial. The decision of the district court is unreported.

ISSUE PRESENTED FOR REVIEW

Whether the district court clearly erred in finding that there is a compelling state interest which necessitates the New York City Transit Authority's absolute refusal to allow plaintiffs to sell political publications in person at any time or place within the New York City subway system?

STATEMENT OF THE CASE

This is a civil rights action founded on 42 U.S.C. § 1983 and the First Amendment. Plaintiffs are members of a socialist political party who desire to sell copies of socialist newspapers in person in New York City subway stations, as a means of communicating the ideas and programs of their party and its electoral candidates. The defendant public officials have prohibited plaintiffs from doing so. Defendants' ban

extends to all times and places within the subway system. Plaintiffs are threatened with criminal penalties if they violate defendants' prohibition.

Proceedings Below

On February 21, 1975 plaintiffs filed their complaint. (App., p.2a.) Plaintiffs requested a declaratory judgment that they are constitutionally entitled to sell copies of the newspapers in person in the subway stations of the New York City Transit Authority, subject to reasonable regulations as to time, manner and place. Plaintiffs also requested a permanent injunction restraining defendants and their subordinates from interfering with such sales. (App., p.6a.)

Three days later, plaintiffs moved for preliminary injunction restraining defendants from continuation of the absolute prohibition against personal selling at any time or place. (R., p.2.) The district court denied the motion on three grounds, namely, that the court lacked jurisdiction of the subject matter, that the restraint on plaintiffs' freedom to sell papers does not amount to irreparable injury, and that the total ban on personal selling at all times and places within the

subway system is a legitimate regulation of the time, manner and place of exercising First Amendment rights. (R., p.11.)

Plaintiffs appealed and moved this court for an injunction pending appeal. On April 27, 1975 the motion was denied without opinion by Judges Mulligan, Timbers and Hays. Oral argument on the merits followed on November 13, 1975.

On January 15, 1976, the court reversed the district court's holding that it lacked subject matter jurisdiction, affirmed the denial of preliminary injunction, and remanded for an expeditious trial. Wright v. Chief of Transit Police, 527 F.2d 1262 (2d Cir. 1976) (App., p.11a).

Trial followed on May 13 and, on July 10, 1976, the district court dismissed the complaint. (App., p.138a.) The court based its action on a finding that the Transit Authority's total ban is justified by a compelling state interest. (Id.) This appeal followed.

Facts

The relevant facts are undisputed. The following statement is based upon unconflicting testimony and exhibits.

A. Parties

Plaintiffs are two local members of the Socialist Workers Party (SWP). (App., pp. 17a, 34a.)

Defendants are the Chairman and Members of the Board of the New York City Transit Authority, and the Chief of Transit Police. (App., p.3a.) They are sued in their official capacities. (Id.)

B. Plaintiffs' Evidence

SWP is a nationwide political party which seeks to bring socialism to the United States through electioneering, distribution of literature and other lawful and peaceful means. (App., pp. 17a-18a.) In 1972 the SWP presidential candidate appeared on the ballot in 23 states. (Id.)

The most important single constituency of the SWP is the working class. (App., p.19a.)

Each week plaintiffs spend up to two hours selling copies of The Militant and Young Socialist newspapers in person in streets and other public places.

(App., p.20a.) Plaintiffs' average weekly sales range from fifteen papers (App., p.20a) to 40 papers (App., p.36a).

The Militant is a socialist newsweekly published in New York City (App., p.20a and Pl. Ex. 1). The paper began publishing in 1928 (App., p.20a). A typical issue contains about 30 pages of socialist analysis of current events and trends. (Id. and Pl. Ex. 1.) The paper endorses the programs of the SWP. (App., p.21a.) It sells for 25¢ per copy. (Id.)

Young Socialist is published monthly. (Pl. Ex. 2.) It was founded in 1957. (App., p.21a.) A typical issue is shorter than The Militant (Pl. Ex. 2), and contains more general articles. Like The Militant, Young Socialist supports socialist programs. (App., pp. 21a-22a.) It also sells for 25¢. (App., p. 22a.)

The papers contain no advertising except as to other socialist literature. (Id.)

Plaintiffs' sole reason for distributing The Militant and Young Socialist is to attempt to communicate socialist ideas and build support for programs and candidates of the SWP. (App., pp. 20a, 34a-35a.) Plaintiffs

do not profit financially from the sales. (App., pp. 25a, 35a, 50a-51a.) 1/

Plaintiffs' method of selling is to display the papers by hand and offer them to nearby individuals. (App., pp. 29a-30a, 39a.) If a person seems interested, plaintiffs try to talk to him or her about the content of the papers and about socialism in general. (Id.) Plaintiffs try to win the individual to their point of view and that of their party. (Id.)

Sometimes a purchaser will look over the purchased paper and then return to the seller to discuss the contents. (App., p.39a.)

Plaintiffs have sold The Militant and Young Socialist in New York City subway stations (App., pp. 31a, 36a), and desire to continue doing so. (App., pp. 19a, 44a-45a.)

The subway stations contain a variety of facilities and features. In addition to the platforms

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1/ Plaintiffs, together with other local members of the SWP, purchase the papers in bulk from the publishers. The cost is 17¢ per copy for The Militant and 15¢ for Young Socialist. Each week each plaintiff obtains a supply of papers and distributes as many as possible. Unsold papers and all sale proceeds are returned to local party headquarters. In some weeks there are unsold papers which must be discarded. If the sale proceeds exceed the outlay to the publishers, the entire excess goes to help support the local political activities. (App., pp. 25a-28a, 35a-36a.)

where passengers await their trains, there are passageways and large areas with shops, newsstands, candy stands, pretzel stands, hot dog stands, and so forth. (App., pp. 39a-41a.)

Sometimes the stations are crowded and busy and at other times they are not. (App., pp. 41a-42a.)

The people in some areas of the stations are moving about, while in other areas, they wait, read, talk, shop and window shop. (App., pp. 42a-43a.)

Subway stations have several qualities which make them effective places for plaintiffs to sell The Militant and Young Socialist. First, the subway stations are protected from the weather. Plaintiffs' experience is that it is practically impossible to sell on the streets on rainy days or during the winter. (App., pp. 30a-31a, 37a-38a.)

Second, the stations contain large concentrations of the working class people who are most receptive to The Militant and Young Socialist. (App., p.38a.)

Third, subway stations contain substantial numbers of people who are waiting around with little to do, and who are therefore especially receptive to plaintiffs' papers and to conversation about socialism. (Id.) This includes people who are waiting for trains and

people who are patronizing the lunch counters, shops and similar facilities that are found in many of the stations. (Id.)

Plaintiffs' purposes cannot be accomplished by selling their papers to the established subway newsstands for resale. (App., pp. 45a-46a.) Plaintiffs are not publishers interested in mass distribution of papers. Plaintiffs are individuals who wish to converse with persons interested in their papers on a one-to-one basis, so as to propagate their ideas. (Id.) For the same reason, plaintiffs' interests could not be accommodated by renting an entire newsstand. (Id. and App., pp. 106a-107a.) Further, plaintiffs have no interest in selling the commercial publications which are the stock in trade of the established newsstands. (App., pp. 106a-107a.) Finally, plaintiffs cannot afford to rent a newsstand for distribution of their papers. (App., p.106a.)

In early December 1974 a police officer ordered plaintiff Wright to stop selling The Militant in the Franklin Avenue IRT station in Brooklyn. (App., pp. 31a-32a.) The officer threatened to ticket her if she did not obey. (App., p.32a.)

On about the same date a police officer ordered plaintiff Lieberman to stop selling The Militant in the 110th Street IRT station in Manhattan, and threatened to ticket him if he did not obey. (App., pp. 43a-44a.)

Plaintiffs obeyed these orders. (App., pp. 32a, 44a.)

On January 28, 1975, plaintiffs, through counsel, wrote to defendants and notified them of plaintiffs' desire to sell The Militant in the subway stations in the manner described above. (App., pp. 46a, 111a.) Plaintiffs expressed willingness to abide by any reasonable regulations as to specific time and place of selling within the stations. (App., p. 111a.) Plaintiffs requested defendants to instruct the Transit Police not to interfere further with the sale of papers by plaintiffs. (App., p. 112a.)

Defendants denied plaintiffs' request by letter of Mr. John G. de Roos, dated February 13, 1975, on the ground that the "sale of 'The Militant' in the manner you propose is prohibited by Transit Authority regulations. (21 NYCRR Part 1051.)" (App., p. 113a.) 2/

2/ The regulation is reproduced in an appendix to this brief.

Mr. de Roos further expressed the opinion that plaintiffs' selling would "interfere substantially" with the "free flow of passenger traffic" and would "thereby create hazardous conditions for subway riders." (Id.)

C. Defendants' Evidence

The width of subway platforms adjacent to tracks is ten feet in local stations and twenty feet in express stations. (App., p.65a.) There is a four foot drop to the roadbed. (App., p.62a.) The roadbed contains an electrified rail and contact with it could be fatal. (App., p.61a.) In fiscal 1975, 522 people fell from platforms to the roadbed, and there are cases where such persons have been injured. (App., p.73a.)

Unusual occurrences, such as an accident or fire, can cause stations to become overcrowded unexpectedly. (App., p.73a.)

There are 59 subway stations containing concessions. (App., p.76a.) Grand Central, for example, contains twelve concessions not counting newsstands. (App., p.77a-78a.)

There are 162 active newsstands within the system. (App., p.80a.) They are operated by Ancorp Services, Incorporated, under an exclusive contract with

the Transit Authority. (App., p.78a.) The Transit Authority receives $250,000 per year under this contract. (App., p.81a.)

Ancorp would rent a newsstand to plaintiffs, "should there be one available, and should the proper financial terms be agreed upon." (App., p.132a.) Neither Ancorp nor the Transit Authority censors the periodicals sold at the newsstands. (App., p.81a.)

The Transit Authority has received complaints from concessionaires (App., p.84a), and passengers (App., p.93a), concerning people soliciting in the subway system.

The transit police force has insufficient personnel for continuous observation and supervision of each subway station. (App., pp. 92a-93a.)

If a person were attempting to sell newspapers and engage in sales talk at the end of a stairway, it could block somebody trying to reach a train. (App., p.94a.)

ARGUMENT

Introduction

The basic issue in this case is whether the personal selling of papers by plaintiffs in the subway system may constitutionally be prohibited by means of a regulatory ban which is sweeping, indiscriminate, and absolute, in that plaintiffs

are forbidden to sell papers in person in any subway station (no matter how spacious and no matter how filled with commercial activity), at any location (no matter how far from trains or moving crowds), at any time (no matter how remote from rush hours).

On the prior appeal, this court defined the issue for trial after remand: whether the defense could show a compelling state interest in totally banning plaintiffs' activities. 3/ Under the law of the case, this court's prior statement of the law and definition of the issue for trial are controlling. Accordingly, we do not repeat here the arguments, which we presented on

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3/ The court said:

> "Defendants express justifiable concern about passenger safety and convenience, space limitation and the possible inundation of their limited facilities by others who would seek the same rights as plaintiffs. However, it is possible that this concern can be accommodated by less than a complete proscription of plaintiffs' activities. While the time, manner and place of solicitation may be regulated, before it can be totally banned, a compelling state interest must be shown. Albany Welfare Rights Organization v. Wyman, 493 F.2d 1319, 1323 (2d Cir.), cert. denied, 419 U.S. 838, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974). Whether such a state interest exists herein must await development of the proof." Wright v. Chief of Police, 527 F.2d 1262, 1264 (2d Cir. 1976) (App., p.13a).

prior appeal, demonstrating why the law requires defendants to show a compelling state interest. 4/

I. THE DISTRICT COURT'S FINDING THAT THERE IS A COMPELLING STATE INTEREST, WHICH REQUIRES A TOTAL BAN ON THE SALE OF POLITICAL PERIODICALS BY HAND AT ALL TIMES AND PLACES THROUGHOUT THE SUBWAY SYSTEM, IS CLEARLY ERRONEOUS.

In order to sustain the Transit Authority's regulation, the district court was required to find that a compelling state interest would be impaired by a relaxation of the blanket prohibition to a point where it no longer constitutes "a complete proscription of plaintiffs' activities" at all times and places within the subway system. Wright v. Chief of Transit Police, supra, 527 F.2d at 1264 (App., p.13a).

Further, the court could not lawfully sustain the blanket regulation except upon finding that the asserted state interests would be "materially and substantially jeopardized" by relaxation of the ban. James v. Board of Education, 461 F.2d 566, 571 (2d Cir. 1972), cert. denied, 409 U.S. 1042 (1972). Any such finding must

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4/ Suffice it to say that Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968), cert. denied, 393 U.S. 940 (1968), is directly in point, as is Albany Welfare Rights Organization v. Wyman, cited by this court on the prior appeal in the passage quoted in footnote 3 above.

be "based upon reasonable inferences flowing from concrete facts and not abstractions." (Id.)

The district court apparently identified two state interests which it regarded as compelling: first, an interest in avoiding interference with "the safety and free flow of traffic" and, second, an interest in collecting "revenue from [the Transit Authority's] leases with newstands and concession stands." (App., p. 138a.) The court apparently found that these interests would be impaired by relaxation of the total ban. (Id.) 5/ This finding cannot stand.

Normally, the findings of trial courts are sustained "unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Federal Rules of Civil Procedure, 52(a). But where, as in this case,

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5/ The court did not specifically address the question whether the "complete proscription" is necessary to preserve the state interests identified. Hence, it is possible that the court failed to apply the correct legal standard as articulated by this court on the first appeal. That alone would be grounds for reversal. However, it would be pointless to remand for additional findings. An examination of the slender record discloses that there is no basis for denying relief to plaintiffs, see discussion below, and this court should so direct.

there is no conflicting testimony and no issue of witness credibility, the "clearly erroneous" standard does not apply. See, e.g., Orvis v. Higgins, 180 F.2d 537, 539 (2d Cir. 1950), cert. denied 340 U.S. 810 (1950), where the court said: "where the evidence . . . deals with undisputed facts, then we may ignore the trial judge's findings and substitute our own." Hence, the present review of the findings below is not limited by the "clearly erroneous" standard.

Even if the clearly erroneous standard be applied, however, the district court's findings cannot stand. Under elementary principles, a finding is "clearly erroneous", either if there is no evidence to support it or if "'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been comitted' [citation omitted]." Russo v. Central School District, 469 F.2d 623, 629 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973). There is no evidence to support the findings below.

Before beginning our analysis of the trial record, we call attention to the conclusory quality of the district court's findings. While the court said

that plaintiffs' activities "would interfere with the safety and convenience of the public" (App., p.136a), "would cause complete havoc with the passengers" (App., p.137a), and are "hazardous to the general public" (Id.), the court did not explain how the evidence supports its position. The same is true of the court's suggestion that plaintiffs' activities would "interfere with the right of the defendants to collect revenue from their newstands and concession stands" (App., p.138a).

The conclusory quality of these findings warrants an unusually close scrutiny of the record by this court.

> "Findings that are nothing but cold rhetoric, couched in extraordinarily broad and general terms, and stripped of underlying analysis or justification or an accompanying memorandum or opinion shedding some light on the reasoning employed, invite closer scrutiny, especially when the case concerns fundamental constitutional freedoms. [Citations omitted.] . . . It stands to reason that unless due care is given to the process of fact finding, the reliability of the district court's conclusions will be subject to question, thus compelling a reviewing court to scrutinize the findings with a sharper eye than is ordinarily appropriate." Russo v. Central School District, supra, 469 F.2d at 628-9. 6/

6/ The Russo case involved a schoolteacher who alleged she was discharged for refusing to participate in flag salutes, in violation of the First Amendment. After trial the district court found that her discharge was based upon other grounds and dismissed the complaint. 460 F.2d at 628. This court reversed, after reaching a contrary conclusion based upon a close examination of the record in accordance with the principles quoted in the text.

A. There is no evidence that a relaxation of the total ban would be hazardous to the public.

Plaintiffs have never disputed that there may be a limited number of times and places within the subway system at which their activities might be hazardous. However, the issue at trial was whether the defendants could show that plaintiffs' activities would be hazardous at all times and places. This they failed to do.

Defendants introduced testimony indicating that, if an individual fell from a platform onto the electrified rail, it could be fatal. (App., p.61a.) But there is no evidence that plaintiffs' activities would have the slightest tendency to cause anyone to fall from a platform. Moreover, even if there were such evidence, it would not support the total ban, which extends to the spacious commercial and other areas of the subway system which are not near the platforms or tracks. 7/

7/ In its memorandum the district court emphasized the conditions existing "upon a narrow station platform." (App., p.137a.) This emphasis is unavailing. First, the Transit Authority's ban is not limited to narrow station platforms. Second, the conclusory characterization of the platforms as "narrow" is unsupported. The platform width is ten feet in local stations and twenty feet in express stations. It is immaterial whether these widths be characterized as "narrow" or "wide." The question is whether there is an evidentiary basis for finding that plaintiffs' activities would be hazardous on the platforms. There is no such basis.

Defendants introduced testimony that if there were an "accident, fire or something of that nature" there might be overcrowding in subway facilities which could not be anticipated. (App., p.73a.) But there is no evidence as to why such rare occasions of unanticipated overcrowding necessitate a total ban on plaintiffs' sales. First, there is no evidence that plaintiffs' activities would be hazardous even during times of overcrowding. Second, if there were such evidence this problem could be dealt with by prohibiting sales during such unusual emergencies, and it would not be necessary to ban them at all times and places.

There was testimony that if plaintiffs were selling newspapers at the end of a stairway, this "could . . . block somebody trying to reach a train." (App., p.94a.) This proves nothing, except perhaps that defendants would be justified in having a regulation prohibiting the sale of newspapers at the end of stairways and similar places. It certainly does not support an absolute ban throughout the entire system.

An executive officer of the Transit Authority, Mr. Wilkinson, testified that "I think it [solicitation] impedes the flow of traffic. . . ." (App., p.99a.) Mr. Wilkinson's thoughts are inadequate to prove a compelling

state interest in defendants' absolute ban. Further, on cross-examination Mr. Wilkinson admitted that there were areas of the subway system where there is no problem of passenger flow. (App., p.105a.) Hence, even if his testimony related to facts, instead of his thoughts, it would be unavailing to establish a compelling interest in banning sales throughout the entire system, including the areas where there is no passenger flow problem.

Evidence was introduced to show that the transit police force does not have sufficient manpower to provide for observation or supervision of plaintiffs. (App., pp. 92a-93a.) But there is not a shred of evidence to show a need for constant observation or supervision if plaintiffs were permitted to sell newspapers in the subway stations. If defendants were to promulgate constitutionally permissible regulations limiting the time, place and manner of plaintiffs' sales, plaintiffs would abide by those regulations and would not require supervision or observation. 8/ There is no reason why it would be any more difficult for the transit police to enforce these regulations than to enforce the numerous other laws and regulations which they enforce without constant observation or supervision of all areas of the subway system.

8/ Plaintiffs have consistently stressed their willingness to observe such regulations. See, e.g., letter of counsel, App., p.111a.

In sum, defendants at most proved that plaintiffs' activities would be hazardous at a few times and places. There is no evidence of hazard at the numerous other times and places. Nor is there evidence to support a "reasonable inference" that plaintiffs' activities would be hazardous at all times and places. 9/ It follows that the judge's finding was clearly erroneous.

9/ The district court stated: "If the plaintiffs were to prevail, it is conceivable that anyone would be able to use the public stations to offer for sale any item for profit, and completely interfere with the free flow of traffic." (App., p.136a.) There is no significance in what the district court regards as "conceivable", as the findings must be based on "concrete evidence" and "reasonable inferences." James v. Board of Education, supra. Moreover, as put by this court in a similar setting:

> "[T]he availability of some alternative forum, and the likelihood of a swarm of protesters each with their special cry disrupting the normal operation of the Terminal, are not material where the issue involves a blanket and wholesale ban." Wolin v. Port of New York Authority, supra, 392 F.2d at 91-2.

The district court also observed that "plaintiffs by applying for and obtaining a newstand would cause no interference with the public." (App., p.136a.) This does not alter the face that there is no evidence that reasonably regulated personal selling would cause significant interference with the public. Moreover, "the availability of some alternative forum . . . [is] not material where the issue involves a blanket and wholesale ban." Wolin v. Port of New York Authority, supra. In any event, it borders on the preposterous to suggest that these plaintiffs rent a newsstand. Plaintiffs have no interest in becoming news dealers and no interest in mass distribution of commercial publications, or even of The Militant and Young Socialist. Plaintiffs' interest is in hand selling a few papers each week on a personal basis. Further, the average annual newsstand rental is more than $1,500 ($250,000 total revenues, divided by 162 active newsstands), a sum which is far beyond plaintiffs' reach. (Plaintiff Wright, for example, earns $90 per week at her job and, predictably, has no money left after meeting her basic living expenses. (App., p.106a.))

B. There is no evidence that a relaxation of the total ban would interfere with the Transit Authority's revenues from concessions and, in any event, there is no compelling state interest in avoiding such interference.

We know of no authority for the proposition that citizens' First Amendment freedoms may be infringed in order to protect the state's ability to obtain revenues from a monopoly on the distribution of publications. Such a principle would permit the City of New York, for example, to establish an above-ground newsstand monopoly and ban citizens from selling publications by hand on the sidewalks and in the parks in order to shore up ailing city finances. The invalidity of such a regime is too plain to require argument. It follows that defendants' concern with their monopoly revenues cannot constitute a "compelling state interest" sufficient to justify their ban. 10/

10/ Moreover, the Transit Authority's revenues from newsstands amount to only $250,000. Even in the unimaginable event that plaintiffs' activities resulted in a total loss of this revenue, it is too small to be a significant -- let alone compelling -- factor in the vast transit budget.

Be that as it may, there is no evidence that plaintiffs' activities would have the slightest impact on defendants' revenues, to say nothing of evidence that the revenues would be "materially and substantially jeopardized." James v. Board of Education, supra, 461 F.2d at 571. Only one witness, Mr. Cilla, gave testimony that is even arguably relevant to this topic. The extent of his direct testimony was as follows:

> "Q. Mr. Cilla, concessionaires have complained to you?
> A. Yes.
> Q. About the people soliciting in the subway?
> A. Yes." (App., p.8 .) 11/

This neither proves nor suggests that plaintiffs' activities would make noticeable inroads on concession revenues. Indeed, it is manifest that defendants' news concessions

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11/ Prior to the quoted colloquy, defense counsel attempted to establish a basis for Mr. Cilla to give opinion testimony by asking whether the witness "can make an opinion as to whether or not [concessionaires'] interest would be adversely affected by people selling newspapers on the subway?" The witness replied, "It would affect the business, yes." (App., p.83a.) This cryptic response was regarded as nothing more than an affirmative answer to the question put, namely whether the witness could "make an opinion." Defense counsel then proceeded to ask for an opinion. (App., p.83a.) Plaintiffs objected (App., p.84a), and the court overruled the objection. (Id.) However, the question objected to was never answered and, instead, defense counsel asked the questions quoted in the text. (Id.)

would remain viable in the face of activities like plaintiffs'. Citizens have sold publications by hand on streets and sidewalks since time immemorial, and there is no resulting dearth of corner newsstands. Indeed, Mr. Cilla testified on cross-examination that the Transit Authority also operated above-ground newsstands, and that he has never even had a complaint from the above-ground news dealers about people selling newspapers on the sidewalks. (App., p.88a.)

We conclude with a word concerning the appropriate action for this court to take. Guidance appears in Wolin v. Port of New York Authority, supra, where the court stated:

> "The District Court is directed to retain jurisdiction and prescribe a time schedule for the promulgation and adoption of reasonable, non-discriminatory regulations of general application governing the activities proposed by the plaintiff. Pending the adoption and approval of those regulations, the plaintiff and those represented by him will be permitted to engage in such activities in a manner consistent with the standards set forth above." 392 F.2d at 94. 12/

In the present case, the court should likewise remand for the promulgation of reasonable regulations, in accordance with standards laid down in the decision of this appeal, or in accordance with the standards articulated in the Wolin decision.

12/ The standards referred to by the court appear in 392 F.2d at 93-4.

Plaintiffs request that the remand include instructions that subsequent proceedings be conducted before a different district judge. Two trips to this court are enough, and all concerned would benefit from having the balance of the case handled with more careful attention to the relevant facts and law.

CONCLUSION

For the reasons stated the judgment should be reversed.

Dated: New York, New York
October 5, 1976

Respectfully Submitted,

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Appellants

APPENDIX

Section 1051.9(a) of the Regulations of the Metropolitan Transit Authority, 21 NYCRR § 1051.9(a), provides:

> "(a) No person shall in any transit facility or upon any part of the New York City transit system, exhibit, sell or offer for sale, hire, lease or let out any object or merchandise, or anything whatsoever, whether corporeal or incorporeal."

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

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Index No.

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~~Plaintiff~~

against

CHIEF OF TRANSIT POLICE, and CHAIRMAN and MEMBERS OF THE BOARD OF THE NEW YORK CITY TRANSIT AUTHORITY,

Defendants-Appellees.

~~Defendant~~

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned, attorney at law of the State of New York affirms: that deponent is the *attorney(s) of record for*

Plaintiffs-Appellants

That on October 5, *1976 deponent served* ~~the annexed~~ two copies of Plaintiffs-Appellants' Brief and one copy of the Appendix on Appeal *on* Stuart Riedel, Esq., General Counsel *attorney(s) for* New York City Transit Authority *in this action at* 370 Jay Street, Brooklyn, New York 11201 *the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated October 5, 1976

Herbert Jordan

The name signed must be printed beneath

Herbert Jordan

Attorney at Law